Lessons Learned From Case Law On Urgency-Based Sole Source Actions

Perilous times have once again been thrust upon our nation and we must defend ourselves against the insidious threat of terrorism. Those of us whose pursuit of "Enduring Freedom" consists of acquiring goods and services for the Warfighter are likely to be called upon, more frequently, to act on urgent requirements for which there is only one source. Previous opinions of the Comptroller General of the United States have provided insight into its interpretation of the Competition in Contracting Act (CICA) and instances when other than full and open competition may be appropriate. Given the anticipated likelihood that there will be increased urgent requirements that are proposed to be fulfilled on a sole source basis, it is prudent that we look at case law to ensure that the mistakes of the past are avoided.

The overarching position of the Comptroller General regarding documentation requirements for other than full and open competitive acquisitions is articulated in National Aerospace Group, Inc. (National), B-282843, August 30, 1999, "While the overriding mandate of CICA is for 'full and open competition' in government procurements obtained through the use of competitive procedures . . . CICA does permit noncompetitive acquisitions in seven specified circumstances. When an agency uses noncompetitive procedures . . . it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority. Our review of the agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and the conclusions set forth in the J&A. When the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award."

The above opinion outlines the Comptroller General's position on protests involving any of the seven exceptions to CICA. The specific focus of this article is application of the exception provided by 10 U.S.C. 2304(c)(2), Unusual and Compelling Urgency. An excellent overview of this exception to full and open competition is provided in an article by Richard Paul Rector, from the Piper Rudnick business law firm, entitled "Streamlining Procurements: "Unusual and Compelling Urgency".

Three cases are discussed below which provide further insight into the Comptroller General's analysis of protests of sole source acquisitions that were based on the Unusual and Compelling Urgency exception to competition.

In the matter of Polar Power, Inc. (Polar), B-270536, March 1996, Polar alleged that the Army lacked sufficient justification for a sole source award to Mechron Energy Systems (Mechron), for an urgent quantity of 600 2 kilowatt (kW) AC generator sets and 50 DC generator sets. In 1988 and 1989, the Government experienced reliability and obsolescence problems with its 3kW generators and awarded a contract for new 3kW Tactical Quiet Generators (TQGs). In 1990, the Government conducted market research to determine if commercially available generators could meet the Government's requirements. As a consequence of negative market research results, the Army issued a draft solicitation in 1992 for a two-step research and development (R&D) program to design a 3kW generator capable of meeting the Government's

requirements. However, funding for that effort was cancelled and a solicitation was, therefore, not issued. In 1993, after new market research indicated that commercial solutions still did not exist, the Army sought solutions for obtaining 2kW generators. Since the Canadian National Defense had already tested and approved Mechron Generator Sets, the Army requested testing of the sets under the Foreign Comparative Testing (FCT) program. The Army successfully conducted tests over a seven-month period ending in September 1995. Due to continuing difficulties, the 3kW TQG contract was terminated for convenience in March 1995 and a new multi-step R&D strategy for 3kW generators was initiated with deliveries planned for FY00. In February of 1995, the Army again surveyed the market through the Electrical Generating Systems Association (EGSA), the official trade association of electrical generating systems manufacturers, and once again concluded that suitable generators were not commercially available. The Army determined that specific units, such as the Rapid Deployment Force, urgently required generators and, therefore, it announced its intent to award a sole source contract to Mechron, in the Commerce Business Daily in November 1995, for the urgent delivery of 650 Mechron Generator Sets within three months of contract award.

Polar protested the award on the basis of inadequate market research and lack of advanced planning. Polar disputed neither the urgent quantity nor that only Mechron could meet the delivery schedule. The Comptroller General's assessment was that only the 1995 EGSA market survey was relevant since its negative results showed the need for the 2kW gapfiller of 650 Generator Sets. Polar was not included in the EGSA survey as EGSA's members principally produce AC Generator Sets while Polar claimed DC generators as its "specialty". The Army contacted 27 manufacturers from EGSA's list and 18 participated in the survey. The Comptroller General found the fact that Polar was not on the list did not make the list unreasonable. Polar claimed that the Army waited too long to terminate the TQG program while waiting for the program to meet its generator needs, constituting a lack of advanced planning. The decision stated that there was nothing in the record demonstrating that the Army acted unreasonably while relying on the 3kW TQG program to meet its needs. In fact, it reflects the opposite; that the Army was involved in advanced planning and eventually initiated the long-term TQG program to meet future requirements coupled with the FCT program to meet current urgent requirements.

The lesson from this case is that even though the 3kW TQG program failed, the Government was taking reasonable actions to meet its requirements and, therefore, these actions cannot be considered a lack of advanced planning.

In the matter of National, B-282843, National protested that it was not given a reasonable opportunity to compete for a length of metal tubing. In anticipation of future buys, National, in October 1998 and again in December 1998, submitted technical data and drawings for the required metal tubing. In April 1999, Defense Supply Center Columbus issued a Request for Quotations (RFQ) for 219 feet of metal tubing from Specialized Metals, Inc. (Specialized), the Original Equipment Manufacturer (OEM) and only approved source for this item. Due to an increase in requirements, the RFQ was cancelled and on 5 May 1999, a Request for Proposals (RFP) was

issued for 541 feet of metal tubing on a sole source basis from Specialized based on urgency. The RFP contained neither a description of the item nor how the metal tubing would be used. On 4 May 1999, the Contracting Officer approved an urgency-based J&A, for a sole source acquisition of 416 feet of metal tubing from Specialized (Note: it is not clear from the record why the RFP was issued for 541 feet of metal tubing but the J&A was for 416 feet of metal tubing). The J&A was a pre-printed form on which the Contracting Officer checked boxes to indicate the statutory authority and that "no technical data can be obtained economically" and that "offers are solicited from as many sources as practicable". Another box was also checked that stated that an attached certification would detail the extent and nature of harm to the "Military Services". No additional information was included in the J&A nor was any certification attached to the J&A.

On 10 May 1999, the Agency determined that National's alternate part was unacceptable stating in its evaluation documentation that the Agency did not have OEM specifications and could not evaluate an alternate submittal. National protested based on the fact that it had submitted technical drawings in December 1998 and despite repeated inquiries, no response was received from the Government. Only the OEM and National, with a lower price, made offers by the 11 May 1999 closing date.

The protest was sustained. The decision to conduct a sole source procurement focuses on the adequacy of the rationale and the conclusions set forth in the J&A. The J&A was completely inadequate since it consisted only of check marks entered on statements on a pre-existing form without supporting explanation and offered no rationale for certifying the extent of harm to the Government. There was no evidence that the Contracting Officer ever attempted to ascertain why this exact item was needed. In accordance with 10 U.S.C. 2319(b), Encouragement of New Competitors, when a procurement is restricted to approved products, offerors proposing an alternate product must be given a reasonable opportunity to qualify. The Agency did not know what the metal tubing was used for, yet took the word of the OEM that its metal tubing was unique, and, therefore, aided in perpetuating the sole source environment which constituted a failure to engage in advanced planning. Justifications for sole source must reasonably show that only an exact product will satisfy the agency's needs and must show that the agency's need for the item is of unusual and compelling urgency that was not created by a lack of advanced planning.

There are three lessons to be gleaned from this case: (1) just checking boxes on pre-existing forms, with no supporting rationale, and only conclusory statements, is not sufficient in the GAO's opinion to establish that the Government has a critical need, (2) lack of technical data is not sufficient justification for a sole source acquisition where the agency can not explain why it needs only a specific item, and (3) where a procurement is going to be restricted to an "approved" product, the agency must give potential offerors a reasonable opportunity to demonstrate that an alternate product is acceptable.

In the matter of McGregor Manufacturing Corporation (McGregor), B-285341, August 2000, McGregor protested an urgent delivery order awarded to General Electric Company (GE)

for deswirl ducts. A deswirl duct is a component of a system that reduces the ability of heat-seeking missiles to lock on, track and destroy a hovering helicopter. McGregor claimed that the Army unreasonably determined that it had an urgent need and, therefore, improperly acquired deswirl ducts from GE, the OEM. Prior to 1996, only GE and Sikorsky Aircraft Corporation (Sikorsky) had been approved sources but GE was a subcontractor to Sikorsky and the sources never competed for awards. In 1996, McGregor submitted a source approval package and became an approved source. In August 1996, McGregor was awarded a contract for 343 deswirl ducts as a result of a competitive procurement in which GE was nonresponsive to the required delivery date. McGregor and the Army experienced numerous delays, some due to deficiencies in the Technical Data Package (TDP) and others due to McGregor's manufacturing process changes that differed from the processes used to pass First Article Tests (FAT). Because of the delays, a new delivery schedule was negotiated with the first delivered unit scheduled for May 1998, which was one year later than the original delivery date. In May 1998, the Army determined that it had an urgent need for 100 deswirl ducts as its supply of deswirl ducts was depleted and a large backorder of requirements had accumulated, thereby creating a potentially serious impact for Warfighters depending on the Blackhawk helicopter. Shortly after the urgency determination was made, McGregor advised the Army that one of its subcontractors had experienced a major fire that would cause significant delivery delays. In June 1998, the Army awarded a sole source contract to GE for 100 deswirl ducts on an urgency basis. McGregor protested the award.

In December 1998, the Army agreed to a revised delivery schedule with McGregor and in February 1999, in order to settle the protest, it awarded McGregor a second contract for 100 deswirl ducts. In April 1999 and again in January 2000, the Army discovered that the TDP provided to McGregor did not contain two GE revisions. Lack of the first revision was causing severe problems on Navy Aircraft using McGregor's parts including deswirl ducts shooting out of the aircraft. The Navy was planning to ground aircraft and a stop work order was issued to McGregor. Eventually, these problems were resolved and new FAT and delivery dates were established. Prior to the resolution of these issues, in February 2000, the Contracting Officer executed a J&A for 273 deswirl ducts from GE on an urgent basis. The J&A calculated the exact quantity of the urgent requirements and stated that "Failure to immediately award the contract will have an adverse effect on operational capabilities of . . .", listing the various types of aircraft and the geographical areas in which they were to operate and the agencies that required them. The Army issued a delivery order for 273 deswirl ducts on 24 March 2000. McGregor protested that the items should have been competed since the Army knew as far back as October 1998 that it had a large requirement.

The protest was denied since an agency may use noncompetitive procedures and award to the only source it believes can meet its schedule. A military agency's assertion that there is a critical need related to human safety which also impacts military operations carries considerable weight and, in this instance, the Army reasonably concluded that only GE could fulfill its requirement within the available time. Although McGregor challenged the quantity of the urgently required items, the calculations provided in the J&A left no basis for questioning the

method used. Although McGregor argued that its delays were either excusable or caused by the Army, that was determined to be not relevant since at the time of award McGregor still had not delivered one useable deswirl duct to the Army.

The lesson from this case is most clearly reflected in the following quotation from the GAO's decision: "Without attributing fault for the numerous delays to either party, it is clear from the record that the reason that the parts were urgently needed was because of the inability of the agency to obtain usable deswirl ducts from McGregor. In these circumstances, the Army reasonably restricted the procurement to GE--the only approved source that had successfully produced usable deswirl ducts to the most recent drawing revisions in the past and the only firm that the Army reasonably believed could deliver sufficient quantities of usable deswirl ducts within the required timeframe--while continuing to work with McGregor in order to have it produce usable deswirl ducts under its outstanding contracts."

The three situations, above contain some common threads. If there is an urgent requirement that negatively impacts mission readiness and personal safety, it must be reasonably documented in a J&A. The documentation must include market research findings and the Government may only acquire the specific quantities of an item needed to address the urgent matter. Additionally, the urgency requirement cannot have resulted from a lack of advanced planning. All acquisition workforce personnel involved in preparing and certifying J&A documents need to understand the goods or services being acquired and ensure that recent market research has been performed and that thorough and complete justifications for sole source actions are prepared in order to ensure that any protests received can be effectively refuted. The review of lessons learned from previous Comptroller General decisions, such as those discussed above, can assist acquisition personnel when they have sole source requirements and are considering the applicability of the urgency-based exception to CICA.

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